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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 UNITED STATES OF AMERICA,) No. CR 04-374-SJO
) CV 07-4160-SJO
14 Respondent,)
)
15 v.) <u>GOVERNMENT'S OPPOSITION TO</u>
) <u>DEFENDANT'S MOTION UNDER 28</u>
16 RITA MARIE LAVELLE,) <u>U.S.C. § 2255</u>
)
17 Petitioner.) No Hearing Date Set
)
18)
19)

20 Plaintiff-respondent United States of America, through its
21 counsel of record, Assistant United States Attorney Dorothy C.
22 Kim, hereby files its opposition to defendant-petitioner Rita
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1 Marie Lavelle's motion to vacate, set aside, or correct her
2 sentence.

3 Dated: February 3, 2010

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On June 26, 2007, defendant-petitioner Rita Marie Lavelle ("defendant") filed a motion to vacate her sentence under 28 U.S.C. § 2255. (CR CR 168)¹. In that motion, defendant claimed that her counsel was ineffective in a number of respects. For the reasons set forth below, the government submits that defendant's counsel was not ineffective and respectfully requests that this Court deny defendant's motion.

II.

PROCEDURAL HISTORY AND RELEVANT FACTS²

A. Defendant's Criminal Conduct

Defendant owned a business called NuTECH Enterprises, Inc., which operated as an environmental consulting company. (PSR ¶ 13). Co-defendant, Robert Virgil Cole, owned a business called DeNova Environmental, Inc., a hazardous waste storage and transfer facility. (PSR ¶ 14). Joseph Bertelli owned a business called Lemco Corporation. (PSR ¶ 15). At the time of defendant's criminal conduct, Bertelli was 80 years old and had

¹"CR CR" refers to the Clerk's Record in the criminal case and is followed by the applicable document control number. "CV CR" refers to the Clerk's Record for the civil case and is followed by the applicable document control number.

²Defendant's motion contains a section entitled "Historical Factual Background." (Def's Mot. 5-13). This section, however, does not include any citations to the record. It also includes numerous incorrect statements. The government does not correct every inaccuracy but responds to misstatements as necessary for purposes of this opposition.

1 undergone treatment for mouth cancer. (Id.). Bertelli hired
2 defendant as a consultant. Capital Partners was a factoring
3 company that advanced monies to clients in exchange for the right
4 to collect clients' accounts receivables. (PSR ¶ 16).

5 Defendant and Cole devised a plan whereby they would obtain
6 money for defendant and, at the same time, satisfy a debt that
7 DeNova owed to defendant and NuTECH. (PSR ¶ 18). Defendant and
8 Cole agreed to make it appear that Lemco owed DeNova over
9 \$52,000, and to assign this alleged debt to Capital Partners in
10 return for an advance that would be sent to defendant. (PSR
11 ¶¶ 17-19).

12 On August 28, 2000, defendant sent a letter to Capital
13 Partners, which attached a number of documents that defendant
14 falsely stated "had been signed" by Bertelli and which made it
15 appear that Bertelli owed DeNova \$52,130. (PSR ¶ 20). Defendant
16 additionally provided Capital Partners with Bertelli's social
17 security number and bank account information so that Capital
18 Partners would be able to access the bank account that Bertelli
19 had purportedly offered as security for the purported debt.
20 Bertelli, however, had never signed any of these documents and
21 had never discussed with defendant any purported debt or
22 guaranteeing a \$52,130 payment to DeNova. (9/23/04 RT 62-67;
23 Exh. C 80-85).

24 Based on the purported personal guarantee of Bertelli,
25 Capital Partners approved a \$36,441 advance to DeNova. (9/22/04
26 RT 138-39; Exh. B 48-49). At the direction of Cole and
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1 defendant, Capital Partners wired the proceeds of the advance,
2 interstate, to defendant's Wells Fargo bank account. (9/22/04 RT
3 108-09; 141-42; Exh. B 46-47, 51-52).

4 On February 26, 2001, defendant admitted to Federal Bureau
5 of Investigation ("FBI") Special Agent Annette Freihon that she
6 had signed Bertelli's name on various documents that she had sent
7 to Capital Partners. (9/23/04 RT 46-47; Exh. C 75-76).

8 On October 17, 2002, after defendant learned that she was
9 the target of an investigation, she requested another interview
10 with Special Agent Freihon. During that interview, defendant
11 changed her story and told Special Agent Freihon that when she
12 received money from Capital Partners, in August 2000, she did not
13 know which accounts receivable Capital Partners was factoring.
14 (9/23/04 RT 52; Exh. C 77). Defendant further stated that she
15 only learned about the fraudulent scheme -- which she attributed
16 to DeNova -- after November 2000, when Bertelli showed defendant
17 a Capital Partners invoice. (9/23/04 RT 53; Exh. C 78).

18 Following the interview, defendant prepared a written
19 declaration. (Id.). Defendant wrote that she did not give
20 Capital Partners any documents until "after the problem emerged."
21 As defendant explained to Special Agent Freihon, by "after the
22 problem emerged," defendant meant after Bertelli had received a
23 Capital Partners invoice. (9/23/04 RT 59; Exh. C 79).

24 On September 10, 2003, and October 8, 2003, at defendant's
25 request, she testified before the grand jury. (9/23/04 RT 10-23;
26 Exh. C 56-69). During that testimony, parts of which were read
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1 into the record at trial, defendant admitted that she had signed
2 Bertelli's name on a purchase order. (9/23/04 RT 28; Exh. C 70).
3 Defendant also admitted that she may have signed Bertelli's name
4 to other documents that she had sent to Capital Partners.
5 (9/23/04 RT 33-34; Exh. C 71-72).

6 B. Indictment and First Superseding Indictment

7 On April 7, 2004, a federal grand jury returned an
8 indictment charging defendant and co-defendant Robert Virgil Cole
9 with one count of wire fraud, in violation of 18 U.S.C. § 1343;
10 and defendant with two counts of making false statements, in
11 violation of 18 U.S.C. § 1001(a). (CR CR 1). On July 28, 2004,
12 a federal grand jury returned a first superseding indictment that
13 charged sentencing factors as "additional allegations." The
14 first superseding indictment charged, in count one, that the loss
15 amount exceeded \$30,000 and that one of the victims to
16 defendant's crimes was unusually vulnerable. (CR CR 52; attached
17 Exh. A). The indictment that was filed with the clerk's office
18 contained the signature of the grand jury foreperson. (Id.).

19 C. Trial

20 On September 21, 2004, a jury trial commenced against
21 defendant. (CR CR 98). Joseph Bertelli testified at trial.
22 Bertelli appeared in a wheelchair and had "significant
23 impairments." (9/22/04 RT 57; Exh. B 36). Among other things,
24 Bertelli had "significant difficulty" in raising his hand.
25 (9/22/04 RT 58; Exh. B 37). At the time of his testimony,
26 Bertelli was 84 years old. (9/22/04 RT 67; Exh. B 38). Bertelli
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1 testified that in 1999, prior to the wire fraud charged in the
2 indictment, he had mouth cancer which resulted in surgery to
3 remove the cancer. (9/22/04 RT 67-68; Exh. B 38-39). Indeed, at
4 the time of trial, Bertelli had trouble speaking because his jaw
5 had been removed.

6 Cynthia Chavez, a paralegal at Wells Fargo Bank testified at
7 trial. She testified as a custodian of records regarding the
8 authenticity of certain bank documents. (9/22/04 RT 76-77; Exh.
9 B 40-41). These bank documents demonstrated that on August 22,
10 2000, defendant had a zero balance in her Wells Fargo account.
11 (9/22/04 RT 77; Exh. B 41). The bank documents also demonstrated
12 that on August 30, 2000, the Bank of Stockton wired \$36,441 from
13 Capital Partner's account into defendant's Wells Fargo bank
14 account. (Id.). On cross-examination, defense counsel elicited
15 that one of the bank records did not contain the notation "Fed
16 wire" next to the August 30, 2000 transfer of funds. (9/22/04 RT
17 83-84; Exh. B 42-43). Counsel apparently intended to suggest
18 that there was some question as to how \$36,441 moved from one
19 bank account to another. On redirect, Chavez clarified that the
20 August 30, 2000 transfer of funds occurred through a wire
21 transfer. (9/22/04 RT 85; Exh. B 44).

22 Kelly Sanford, who was employed by the Federal Reserve Bank
23 in Kansas City, also testified at trial. (9/22/04 RT 107; Exh. B
24 45). Sanford testified about Exhibit 75, a document that
25 demonstrated that on August 30, 2000, the Bank of Stockton wired
26 money from Capital Partner's bank account to the defendant's
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1 Wells Fargo account, and that the wiring of such funds traveled
2 through East Rutherford, New Jersey. (9/22/04 RT 108-09; Exh. B
3 46-47).

4 At the close of the government's case-in-chief, defense
5 counsel moved, under Fed. R. Crim. Proc. 29, to dismiss all three
6 counts of the indictment. (9/23/04 RT 119-21; Exh. C 86-88).
7 The Court denied the motion.

8 Defendant testified at trial. Although defendant had
9 admitted, before the grand jury, to signing Bertelli's name to
10 various documents she submitted to Capital Partners, at trial,
11 she changed her testimony and stated that Bertelli had actually
12 signed some of the documents himself. (9/23/04 RT 177-78; Exh. C
13 89-90). Defendant then modified her response and testified that
14 because Bertelli was in poor health, defendant sometimes signed
15 documents for him, but only after discussing such documents with
16 Bertelli. (9/23/04 RT 185; Exh. C 92).

17 In charging the jury, the Court delivered the following
18 instruction, among others:

19 The term 'vulnerable victim' means a person who is a
20 victim of the offense of conviction and who is
21 unusually vulnerable due to age, physical or mental
condition, or who is otherwise particularly susceptible
to the criminal conduct.

22 (9/24/04 RT 32; Exh. D 97). This instruction was taken directly
23 from the sentencing guidelines. USSG § 3A1.1 n.2.

24 On September 27, 2004, following five days of trial, the
25 jury convicted defendant on all three counts of the first
26 superseding indictment and found each of the sentencing
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1 allegations to be true. (CR 102). On October 4, 2004, defendant
2 filed a written Rule 29 motion to dismiss all three counts of the
3 indictment. (CR CR 110). The Court denied that motion.

4 D. Sentencing

5 The Presentence Report ("PSR") was disclosed to the parties
6 on December 13, 2004. It applied the November 1, 2001 edition of
7 the Sentencing Guidelines, the guidelines that applied to
8 defendant's false statement counts. (PSR ¶ 35). It concluded
9 that defendant's base offense level was 6, under USSG § 2B1.1(a).
10 (PSR ¶ 37). It then applied a 6-level increase for the loss
11 amount, under USSG § 2B1.1(b)(1)(D) (PSR ¶ 38), and a 2-level
12 vulnerable-victim enhancement, under USSG § 3A1.1(b)(1) (PSR
13 ¶ 40). The PSR calculated defendant's total offense level to be
14 14. (PSR ¶ 42). Because defendant's total offense level would
15 have been 14 under the November 1, 2000 edition of the Sentencing
16 Guidelines, the guidelines that would apply to defendant's wire
17 fraud conviction, the PSR concluded that the application of the
18 November 1, 2001 edition of the guidelines did not raise any ex
19 post facto issues. (PSR ¶ 35). Indeed, under the November 1,
20 2000 edition of the Guidelines, defendant's base offense level
21 would have been 6, under USSG § 2F1.1(a). Defendant would have
22 received a 4-level enhancement for amount of loss, under USSG
23 § 2F1.1(b)(1)(E), a 2-level enhancement for a scheme to defraud
24 more than one victim, under USSG § 2F1.1(b)(2), and a 2-level
25 vulnerable-victim enhancement, under USSG § 3A1.1(b)(1).

26 The government submitted its sentencing position in which it
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1 agreed with the calculations set forth in the PSR. (CR 123).

2 On December 20, 2004, defendant filed her sentencing
3 position in which she argued that the November 2000 Guidelines
4 should apply to her sentence. (CR CR 121). Defendant
5 additionally argued that under that version of the Guidelines,
6 neither the multiple victim enhancement nor the vulnerable victim
7 enhancement should apply. (Id.). According to defendant, only
8 Capital Partners and not Bertelli was a victim of her fraudulent
9 scheme. (Id.). Defendant additionally moved for a downward
10 departure in her sentence. (Id.).

11 At the sentencing hearing, the Court expressly stated that
12 it believed there was more than one victim to defendant's crime,
13 namely, Capital Partners and Bertelli. (1/10/05 RT 18-19; Exh. E
14 128-29). It also concluded, based upon its observation of
15 Bertelli at trial, that Bertelli was a vulnerable victim within
16 the meaning of USSG § 3A1.1. (1/10/05 RT 19; Exh. E 129) (stating
17 "it was clear to the Court, at the time of trial, at least, that
18 Mr. Bertelli was in an extremely delicate state;" and "I think it
19 was obvious to the jury, it's obvious to the Court, that Mr.
20 Bertelli was and is a vulnerable victim. He qualifies as such;
21 therefore, the Court would conclude that it would also apply.").
22 The Court therefore concluded that the application of the
23 November 1, 2001 Guidelines did not raise any ex post facto
24 issues. The Court calculated defendant's total adjusted offense
25 level to be 14 and defendant's criminal history category to be I,
26 resulting in a guideline range of 15-21 months. (1/10/05 RT 20;

1 Exh. E 130). The Court sentenced defendant to 15 months.

2 (1/10/05 RT 21; Exh. E 131).

3 E. First Appeal

4 On January 19, 2005, defendant filed her first notice of
5 appeal. (CR CR 138). On appeal, defendant argued that the
6 district court erred in its application of the Sentencing
7 Guidelines. Defendant also argued that the Court had erred in
8 failing to deliver to the jury additional instructions regarding
9 the sentencing enhancements.

10 On August 25, 2005, the Court of Appeals affirmed
11 defendant's sentence, in part, finding that the district court
12 correctly applied the Sentencing Guidelines. It ordered a
13 limited remand under United States v. Ameline, 409 F.3d 1073 (9th
14 Cir. 2005) (en banc).

15 F. Ameline Remand

16 On March 24, 2006, the Court ruled that it would not have
17 imposed a materially different sentence had it known the
18 Sentencing Guidelines were advisory. (CR 176).

19 G. Second Appeal

20 On March 30, 2006, defendant filed her second notice of
21 appeal. (CR CR 181). On appeal, defendant argued that the Court
22 erred in failing to provide a sufficient explanation of its
23 reasons for not imposing a materially different sentence.

24 H. 2255 Motion

25 On June 26, 2007, defendant filed the instant motion to
26 vacate her sentence under 28 U.S.C. § 2255. (CR CR 188). On
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1 August 31, 2007, the government filed a motion to stay the
2 proceedings until defendant's pending appeal was resolved. (CV
3 CR 4). On September 26, 2007, the Court ordered that the motion
4 be stayed. (CV CR 5). The Court further ordered that "[t]o lift
5 the stay, [defendant] must file with the Court a copy of the
6 order resolving her appeal." (*Id.*). On October 21, 2008, the
7 Court of Appeals affirmed defendant's sentence.

8 III.

9 ARGUMENT

10 Defendant argues that her trial counsel was ineffective at
11 trial and sentencing because counsel: (1) failed adequately to
12 challenge the Court's application of the vulnerable victim
13 enhancement; (2) inadequately cross-examined two witnesses,
14 Cynthia Chavez and Kelly Sanford; (3) improperly permitted
15 defendant to testify at trial; and (4) failed to object to the
16 government's failure to produce to defendant a copy of the
17 indictment signed by the grand jury foreperson. For the reasons
18 set forth below, none of defendant's claims have merit and each
19 should be dismissed by this Court.

20 A. Standard For Evaluating Defendant's Claim

21 The standard for evaluating a Sixth Amendment ineffective
22 assistance of counsel claim is set forth in Strickland v.
23 Washington, 466 U.S. 668 (1984). A defendant claiming
24 ineffective assistance of counsel bears the burden of
25 demonstrating that, under all the circumstances of her case,
26 (1) "[her] counsel's performance was so deficient that it fell
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1 below an 'objective standard of reasonableness,'" Hensley v.
2 Crist, 67 F.3d 181, 184-85 (9th Cir. 1995) (quoting Strickland,
3 466 U.S. at 688), and (2) her counsel's deficient performance
4 prejudiced her, meaning "there is a reasonable probability that,
5 but for counsel's unprofessional errors, the result of the
6 proceeding would have been different." Id. (emphasis in
7 original) (quoting Strickland, 466 U.S. at 694).

8 As to the first prong of Strickland, courts reviewing the
9 reasonableness of an attorney's conduct must examine the
10 attorney's "overall performance," and must be highly deferential
11 to the attorney's judgments. Strickland, 466 U.S. at 688-89.
12 There exists a "strong presumption that counsel rendered adequate
13 assistance and made all significant decisions in the exercise of
14 reasonable professional judgment." United States v. Quintero-
15 Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995) (internal quotations
16 omitted). "[T]he defendant must surmount the presumption, that
17 under the circumstances, the challenged action 'might be
18 considered sound trial strategy.'" Id. at 1348 (quoting
19 Strickland, 466 U.S. at 689). "The reasonableness of counsel's
20 performance is to be evaluated from counsel's perspective at the
21 time of the alleged error and in light of all the circumstances,
22 and the standard of review is highly deferential." Kimmelman v.
23 Morrison, 477 U.S. 365, 381 (1986). As the court explained in
24 United States v. Claiborne, 870 F.2d 1463, 1468 (9th Cir. 1989),
25 "[i]n applying the first prong, it is clear that a reviewing
26 court is not free to engage in after-the-fact second-guessing of
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1 strategic decisions made by defense counsel. Instead, judicial
2 scrutiny of 'counsel's performance must be highly deferential.'
3 (quoting Strickland, 466 U.S. at 689).

4 Even if a defendant is able to satisfy the first prong, she
5 must then establish that the deficient performance prejudiced her
6 defense by showing that there is "a reasonable probability that,
7 but for counsel's unprofessional errors, the result of the
8 proceeding would have been different." Id. at 694. "A
9 reasonable probability is a probability sufficient to undermine
10 confidence in the outcome." Id. To sustain her burden, a
11 defendant is required to show that her counsel's conduct "so
12 undermined the proper functioning of the adversarial process that
13 the trial cannot be relied upon as having produced a just
14 result." Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992).

15 A defendant who fails to satisfy either the deficient
16 performance or the prejudice prong of the Strickland test has
17 failed to make out a claim for ineffective assistance of counsel.
18 Strickland, 466 U.S. at 697; United States v. Bosch, 914 F.2d
19 1239, 1244 (9th Cir. 1990). Here, defendant can satisfy neither
20 prong of Strickland.³

21 _____
22 ³Defendant's ineffective assistance of counsel claim results
23 in a waiver of the attorney-client privilege as to communications
24 with her former counsel relevant to the ineffective assistance
25 claim. In light of Bittaker v. Woodford, 331 F.3d 715 (9th Cir.
26 2003), however, the procedures required to define the contours of
27 the appropriate waiver and implement it with the required
28 limitations could significantly delay proceedings in this case.
For the reasons set forth below, the government believes that
defendant's ineffective assistance of counsel claim can be
resolved against defendant without disclosure of communications
between defendant and her former counsel, and so without the need

B. Defendant Cannot Demonstrate That Her Counsel Was Constitutionally Ineffective

1. *Vulnerable Victim Enhancement*

Defendant argues that her trial counsel was ineffective at sentencing because he: (1) failed to file a Rule 29 motion to dismiss the vulnerable victim enhancement; (2) admitted during closing argument that Bertelli was a cancer victim; and (3) failed to request special jury instructions defining "vulnerable victim." (Def's Mot. 14-15).⁴ According to defendant, had her lawyer been more effective, the two-level vulnerable victim enhancement would not have applied to her sentencing. Defendant's claims are not supported by the record or case law.

First, although defendant complains that her lawyer failed to move, under Rule 29, to dismiss the vulnerable victim

for the parties and the Court to engage in the time-consuming procedures required to disclose those communications. If the Court disagrees, and believes that examination of the communications between defendant and her former counsel are necessary to resolution of defendant's ineffective assistance of counsel claim, the government requests that the Court find a limited waiver of the attorney-client privilege and permit the government to submit a filing setting forth procedures for implementing the waiver and requesting a briefing schedule for further addressing defendant's ineffective assistance claim.

⁴Defendant additionally claims that defense counsel was ineffective in failing to request a special jury instruction defining "multiple victim." (Def's Mot. 15). The indictment, however, did not charge defendant with defrauding multiple victims. Instead, the multiple victim enhancement was only relevant to determining whether the application of the 2001 Guidelines raised any ex post facto issues. Since defendant had not been charged with defrauding multiple victims, it would have been nonsensical to request a jury instruction regarding this sentencing enhancement.

enhancement, a review of the record demonstrates that counsel moved twice to dismiss all counts of the indictment, including count one, which included the enhancement. (9/23/04 RT 119-21; Exh. C 86-88; CR CR 110). Similarly, although defendant complains that her lawyer admitted during closing argument that Bertelli was "a cancer victim" (Def's Mot. 15), a review of the entirety of defense counsel's closing argument demonstrates that counsel made no such mention of cancer. (9/24/04 RT 53-79; Exh. D 98-125).⁵ Finally, defendant's complaint that her counsel was ineffective in failing to request a specific jury instruction defining vulnerable victim, ignores that the Court in fact delivered a jury instruction defining that term. The record therefore does not support defendant's complaints regarding her counsel's performance at sentencing.

The government therefore will construe defendant's argument as one claiming that counsel should have done more, i.e., that counsel: (1) should have tailored his Rule 29 motion to focus on the vulnerable victim sentencing enhancement; (2) should have vigorously contested Bertelli's poor health and undisputed age during closing argument; and (3) should have requested additional jury instructions regarding "vulnerable victim." Even so construed, defendant's argument fails the first prong of Strickland.

A review of the record demonstrates that each of the

⁵The only reference that counsel made during closing argument to Bertelli's health was that "we know he had serious health problems four years ago." (9/24/04 RT 61; Exh. D 106).

1 decisions about which defendant now complains can be deemed the
2 exercise of sound trial strategy. First, defense counsel's
3 decision to focus his zealous Rule 29 motions on the actual
4 counts of conviction rather than the sentencing enhancement was
5 reasonable. Had the Court granted the Rule 29 motion, it would
6 necessarily have entered a judgment of acquittal on all counts of
7 conviction, including count one. Moreover, the evidence
8 overwhelmingly demonstrated that Bertelli was vulnerable.
9 Bertelli testified about his age and physical condition. The
10 jury observed Bertelli at trial. Even defendant admitted during
11 her testimony that Bertelli was in poor health at the time of the
12 events at issue. Indeed, she used it as an excuse to explain why
13 she would have signed certain documents for him. Defense counsel
14 therefore acted reasonably in not arguing that there was
15 insufficient evidence to support this uncontroversial fact.

16 Similarly, defendant's failure to request any additional
17 instructions regarding the vulnerable victim enhancement cannot
18 be deemed objectively unreasonable since the Court had already
19 defined that term for the jury. Accordingly, no other
20 instruction was necessary. It is well established that "the
21 district court need not define common terms that are readily
22 understandable by the jury." United States v. Hicks, 217 F.3d
23 1038, 1045 (9th Cir. 2000) (holding that district court did not
24 need to define the terms "false" or "statement" and collecting
25 cases discussing terms that need not be defined, including
26 "commercial advantage," "private financial gain," "violence,"
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1 "organizer," "supervisor," and "manager"). Here, no further
2 definition of the terms "vulnerable" of "victim" was necessary.
3 Even in hindsight, defendant cannot articulate what additional
4 jury instructions the Court should have delivered. Her inability
5 to point to any additional appropriate instruction further
6 demonstrates that counsel's performance was reasonable.

7 Finally, a review of the entirety of defense counsel's
8 closing argument demonstrates that defense counsel's tactical
9 decision not to challenge Bertelli's status as a vulnerable
10 victim was a reasonable one. The evidence well demonstrated that
11 Bertelli was elderly and unwell. Moreover, defendant had
12 testified that she sometimes signed documents for Bertelli
13 because of his poor health. Accordingly, if defense counsel were
14 to challenge that Bertelli was elderly and in poor health at the
15 time of defendant's offense, he would not only have lost
16 credibility with the jury but also would have made an argument
17 that was contrary to one of defendant's defenses.

18 Defendant also cannot satisfy the second prong of Strickland
19 because she cannot establish that she suffered any prejudice as a
20 result of her counsel's purported missteps. As set forth above,
21 there was and could be no dispute at trial that Bertelli was
22 vulnerable. Therefore, if the jury concluded that Bertelli was a
23 victim of defendant's fraud, it necessarily would have concluded
24 that he was vulnerable, even if defense counsel performed exactly
25 as defendant now wishes he had.

26 More importantly, the unique procedural posture of this case
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1 makes it impossible for defendant to demonstrate prejudice.
2 Defendant was initially sentenced during the brief period of time
3 when United States v. Ameline, 376 F.3d 967 (9th Cir. 2004)
4 ("Ameline I") was the law of the Circuit, and the government was
5 required to prove sentencing enhancements beyond a reasonable
6 doubt. However, following the initial sentencing hearing,
7 Ameline I was withdrawn on rehearing en banc and the Booker
8 decision was issued. See Ameline I, 376 F.3d 967, reh'g granted,
9 400 F.3d 646 (9th Cir. 2005), withdrawn on grant of reh'g en
10 banc, 401 F.3d 1007 (9th Cir. 2005). Booker made clear that
11 sentencing enhancements do not have to be proven to a jury beyond
12 a reasonable doubt. United States v. Booker, 543 U.S. 220
13 (2005). District courts retain the authority to find
14 enhancements based upon a preponderance of the evidence standard.
15 Accordingly, the jury's finding regarding the vulnerable victim
16 enhancement was irrelevant to defendant's ultimate sentence. The
17 authority rested with this Court to sentence defendant based upon
18 its findings. Here, the Court not only stated at the initial
19 sentencing hearing that it concluded Bertelli was vulnerable, but
20 it specifically concluded during the Ameline remand that a 15-
21 month sentence was appropriate in light of the factors set forth
22 at 18 U.S.C. § 3553(a) factors. In this circumstance, the record
23 well establishes that defendant in fact suffered no prejudice as
24 a result of her lawyer's conduct at sentencing.⁶

25
26 ⁶Defendant additionally claims that the Court "instructed
27 the jury that the government did not have to prove that
[defendant] actually committed the crime -- but that it was

1 2. *Cross-Examination of Chavez and Sanford*

2 Defendant next complains that during trial, her counsel
3 failed adequately to cross-examine Chavez and Sanford. Chavez
4 testified as a custodian of records, in order to authenticate
5 bank documents that demonstrated that on August 20, 2000, \$36,441
6 was wired from Capital Partners's Bank of Stockton account into
7 defendant's Wells Fargo Bank account. Under Fed. R. Evid.
8 902(11), the documents introduced by Chavez were self-
9 authenticating and the government could have, if it chose,
10 admitted them without Chavez's testimony. See Fed. R. Evid.
11 902(11). Sanford testified that the August 20, 2000 wiring
12 traveled interstate, through New Jersey.

13 The bank documents speak for themselves. As with most wire
14 fraud cases, the fact that money moved from one place to another,
15 and that such movement was implemented by interstate wire, should
16 not have been a controversial issue at trial. There was simply
17 no evidence to rebut the existence of the interstate wiring.
18 Under the circumstances, defense counsel's cross-examination of
19 the witnesses was reasonable. Even if defense counsel had spent
20 more time cross-examining the witnesses, there is no possibility,
21 much less a reasonable probability, that the jury could conclude
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23
24

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26 _____
27 sufficient if she merely thought of doing it." (Def's Mot. 12).
28 Defendant has failed to support her contention with a citation to
the record. The government's review of the transcript indicates
that the Court never delivered any such instruction to the jury.

1 that the wiring at issue in this case did not travel interstate.⁷

2 3. Defendant's Testimony

3 Defendant next contends that her counsel was ineffective in
4 permitting her to testify and subjecting her to cross-
5 examination. The precise nature of defendant's claim, however,
6 is not clear. In her motion, defendant claims that counsel
7 should have prevented her from testifying at trial. At the same
8 time, she also complains that counsel did not elicit enough
9 information from her on direct. (Def's Mot. 16-17). As to
10 defendant's complaint that her counsel should not have permitted
11 her to testify, defendant ignores that a defendant has a due
12 process right to testify in her own defense. See Rock v.
13 Arkansas, 483 U.S. 44 (1987). Moreover, it is the defendant who
14 "has the ultimate authority to make certain fundamental decisions
15 regarding the case, as to whether to plead guilty, waive a jury,
16 testify in his or her own behalf, or take an appeal." Jones v.
17 Barnes, 463 U.S. 745, 751 (1983) citing Wainwright v. Sykes, 433
18 U.S. 72, 93 n.1 (1977). Here, defendant has failed specifically
19 to articulate how counsel, in permitting defendant to exercise
20 her Fifth Amendment right to testify, was ineffective. Defendant

21 _____
22 ⁷Defendant suggests that if Capital Partners paid defendant
23 by check, no interstate wires could have been used to further her
24 scheme. (See Def's Mot. 15). This argument is without merit.
25 First, there was no dispute at trial that \$36,441 was wired from
26 Capital Partners' bank account, interstate, to defendant's bank
27 account. Moreover, even if Capital Partners had sent defendant a
check instead, defendant's argument would fail if the funds were
subsequently wired from one bank to another, interstate. See
e.g. United States v. Wolfson, 634 F.2d 1217, 1220 (9th Cir.
1980) (interstate telephone calls to fictitious bank by victim
who received worthless check, were within wire fraud statute).

1 does not assert (much less support with a declaration or other
2 form of evidence) that her counsel forced her to testify, failed
3 to advise her of her Fifth Amendment privilege against self-
4 incrimination, or failed to discuss with her the potential
5 ramifications of testifying.⁸ Accordingly, defendant has not
6 established that her counsel's performance was deficient.

7 As to defendant's complaint that counsel should have
8 elicited from defendant additional alleged facts, again defendant
9 has failed to support her assertions with any evidence. The
10 government submits that no such evidence exists. For instance,
11 defendant contends that her counsel should have elicited from
12 defendant that the FBI case agent and the prosecutors on the case
13 "were the very same group of governmental officials which had by
14 now federalized and seized DeNova's and Mr. Cole's assets."
15 (Def's Mot. 10). As far as the government is aware, neither the
16 U.S. Attorney's Office nor the FBI ever seized DeNova or Cole's
17 assets. Defendant also criticizes her counsel for failing to
18 elicit during her testimony that defendant was expected to
19 "testify against the [U.S. Attorney's Office] in an upcoming
20 administrative hearings for the illegal search and seizure of
21

22 ⁸Because defendant has failed to present any evidence that
23 needs to be rebutted, the government has not sought additional
24 information from defense counsel. As set forth above in footnote
25 3, if the Court determines that additional information is
26 necessary to adjudicate defendant's claim, the government
27 respectfully requests that the Court find a limited waiver of the
attorney-client privilege and permit the government to submit a
filing setting forth procedures for implementing the waiver and
requesting a briefing schedule for further addressing the
defendant's claims.

1 several properties and businesses as well as abuse of authority
2 and trust under the Superfund laws." (Def's Mot. 17). The
3 government is not aware of any such administrative hearing or any
4 allegation regarding the legality of any search or seizure
5 conducted in connection with this case. Defendant further
6 suggests that she would have prevailed at trial had counsel
7 elicited that the prosecutors and the FBI agent were "then being
8 investigated by the Inspector General and several congressional
9 committees." (Def's Mot. 17). Once again, the government is not
10 aware of any such investigation. Defense counsel's failure to
11 elicit false testimony cannot be deemed objectively unreasonable
12 under the circumstances. To the contrary, had defense counsel
13 elicited what he would have known to be perjured testimony, he
14 would have been acting unethically. See Rule 5-200 of Cal. Rules
15 of Professional Conduct.

16 Defendant also cannot demonstrate that had defense counsel
17 elicited any of her purported facts that the jury would have
18 acquitted her of the charges. The evidence of defendant's guilt
19 was overwhelming. Defendant told Capital Partners that Bertelli
20 had personally guaranteed a debt to DeNova. Defendant then
21 submitted certain documents to Capital Partners, which she stated
22 had been signed by Bertelli. In return, defendant received
23 \$36,441. At trial, Bertelli testified that he had never
24 guaranteed any debt to DeNova and had not signed any of the
25 documents that defendant had submitted to Capital Partners.
26 Defendant admitted to the FBI and the grand jury that she had
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28

1 signed Bertelli's name to certain documents. Even without
2 defendant's testimony, the evidence well established defendant's
3 guilty. Accordingly, defendant has not met her burden of proving
4 that her counsel's alleged failures with regard to her testimony
5 "so undermined the proper functioning of the adversarial process
6 that the trial cannot be relied upon as having produced a just
7 result." Denham v. Deeds, 954 F.2d at 1505.

8 4. *Signed Copy of Indictment*

9 Finally, defendant contends that her counsel was ineffective
10 because he "failed to raise the failure of the Government to
11 produce any indictment ever signed by the Grand Jury foreman as a
12 complete defense to the charges, as mandated by Fed. R. Crim.
13 Proc. 6(c)." (Def's Mot. 17). A signed copy of the first
14 superseding indictment was filed with the clerk. (CR CR 52;
15 attached Exhibit A). There is no legal support for defendant's
16 argument that the government was required to provide her with a
17 signed copy of the indictment and that her counsel was
18 ineffective in failing to insist that it did so. See White v.
19 Sanford, 142 F.2d 429, 430 (5th Cir. 1943) (where the original
20 indictment was signed by the grand jury foreperson, defendant was
21 not entitled to release on writ of habeas corpus despite
22 defendant's possession of an unsigned copy of the indictment).
23 Accordingly, defendant can neither demonstrate that her counsel's
24 failure to demand a signed copy of the indictment was objectively
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unreasonable or that she suffered any prejudice as a result.⁹

IV.

CONCLUSION

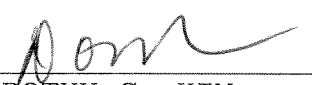
For the reasons stated above, the government requests that this Court deny defendant's motion.

Dated: February 3, 2010

Respectfully submitted,

GEORGE S. CARDONA
Acting United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division


DOROTHY C. KIM
Assistant United States Attorney

Attorneys For Plaintiff
United States of America

⁹At pages 19 to 22 of her motion, defendant complains about the pace of her pending second appeal. Given the Court of Appeals's denial of her second appeal, defendant's complaints are now moot.

CERTIFICATE OF SERVICE

I, **Georgina Moreno**, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction I served a copy of:

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION UNDER
28 U.S.C. § 2255

service was:

☐ Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

☒ Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

☐ By hand delivery addressed as follows:

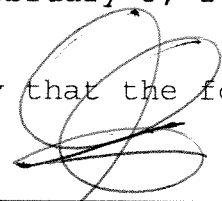
☐ By facsimile as follows:

☐ By messenger as follows: ☐ By federal express as follows:

Ronald Gold
Oldman, Cooley, Leighton, Sallus, Gold & Birnberg
16133 Ventura Blvd., Penthouse, Suite A
Encino, CA 91436-2408

This Certificate is executed on **February 3**, 2010 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.



GEORGINA MORENO